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No. 02-458

IN THE

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C., Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON, Trustee,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

The issue before the Court in this case is whether the sole shareholder of a corporation, a Debtor in bankruptcy, should be classified as an "employer" or an "employee" as those terms are defined in the Employee Retirement Income Security Act of 1974 ("ERISA").

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STATUTORY PROVISIONS INVOLVED

This issue before the Court in this case relates to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 (2003), (hereinafter "ERISA"). Specifically, this case relates to the definition of an "employer," of an "employee," and of a "participant" as contained in 29 U.S.C. §§ 1002(5), (6), and (7).

STATEMENT OF THE CASE

This appeal emanates from an involuntary bankruptcy case filed against Raymond B. Yates under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*) The facts of this appeal are largely undisputed.

The undisputed facts show that the individual debtor in bankruptcy, Raymond B. Yates, was the sole shareholder of Raymond B. Yates, M.D., P.C. (Joint Appendix, hereinafter "JA," 1a-3a)[1] . By agreement dated July 20, 1989, Raymond B. Yates, M.D., P.C., adopted a Profit Sharing Plan named the "Raymond B. Yates, M.D., P.C., Profit Sharing Plan."[2] (*Ibid.*). At times material hereto, the Debtor and three other participants participated in the Plan. (JA 269a).

On December 13, 1989, the Debtor received a loan from the Plan. (JA 267a-269a). Also on that date, the Debtor executed a promissory note payable to Plan evidencing the

1. The individual debtor, Raymond B. Yates, will be referred to hereafter as "the Debtor" when referred to in his individual capacity as the debtor in bankruptcy.

2. The Raymond B. Yates, M.D., P.C. Profit Sharing Plan will be referred to hereinafter as "the Plan."

loan. (JA 259a). The note specified the amount of the loan and the interest rate accruing upon the unpaid balance but provided for no periodic payments. (*Id.*). Although the initial term of the loan was for a period of five years, the note was purportedly extended for another period of five years. (JA 269a).

The loan in and of itself violated the terms of the adopted plan in several ways. First, the Plan terms prohibited any loans to "Shareholder-employees" or "Owner-employees." (JA 207a). Secondly, the Plan required all loans to be repaid by payroll deductions made at least quarterly. (JA 67a). Thirdly, the Plan prohibited loan repayment periods of longer than five years unless the loan was for the purchase of a principal residence. (*Id).* And finally, there are no facts in the record indicating that the procedures outlined in the Plan (at pages JA 68a-69a) were followed.

This loan was not repaid until November 1996, in the total amount of $50,467.46, upon the sale of certain real property owned by the Debtor. (JA26a-28a). Other than another lump sum payment from an inheritance, no other payments on this loan had been made by the Debtor contrary to the terms of the adopted plan. (*Id.*) The repayment of the $50,467.46 at issue herein came at a time when the debtor was involved in extensive litigation with one of his creditors, wherein the creditor was seeking to recover on its loans to the Debtor. (JA 25a). In fact, on December 2, 1996, and within weeks of the repayment of the loan by the Debtor to the pension plan, an involuntary bankruptcy petition under Title 11 of the United States Code was filed by the litigating creditor against the Debtor. (JA 31a).

On August 5, 1998, the Respondent, William T. Hendon, Chapter 7 Trustee in the bankruptcy case, filed an adversary proceeding against the Plan and the Plan's Trustee. (JA 1a-3a). The Bankruptcy Trustee alleged that the repayment by the debtor of the sum of $50,467.46 to the Plan was an avoidable transfer and sought recovery from the Plan pursuant to 11 U.S.C. §§ 547 and 550. (*Id.*).

On October 3, 1998, the Plan and the trustee of the Plan filed their answer to the Respondent's Complaint. (JA 4a). In their Answer, these Petitioners admitted that in November of 1996, and within 90 days of the filing of the Involuntary Petition against the Debtor, the Debtor repaid the sum of $50,467.46 to the Plan in repayment of loans the Debtor had received from the Plan. (*Id.*). The Petitioner Plan alleged that the Plan assets were exempt by law and that a return of the funds would be violation of the disbursement provisions of the Plan. (JA 6a).

On March 31, 1999, each party filed a Motion for Summary Judgment with supporting documents and memorandum. (Petitioners' Petition for Writ of Certiorari, hereinafter "Petition" at page 36a). On September 2, 1999, the Bankruptcy Court filed its Memorandum on Cross Motions for Summary Judgment granting the Respondent's Motion for Summary Judgment and denying the Petitioner's Motion for Summary Judgment. (*Id.*). Specifically, the Bankruptcy Court ruled that the Respondent had established all of the elements required by 11 U.S.C. § 547 concerning the avoidability of a preferential transfer. (Petition 41a-42a). The Bankruptcy Court further held that individual Debtor's interest in the Plan was not in a qualified ERISA plan and that the provisions of ERISA did not bar the Trustee from recovering the preferential transfer made by the Debtor to the Plan. (Petition 43a-44a).

On June 26, 2000, the District Court affirmed the decision of the Bankruptcy Court that the Debtor's interest in the Plan was not protected by the provisions of ERISA. (Petition 9a). In addition, the District Court affirmed the Bankruptcy Court as to the remaining issues before it affirming the Bankruptcy Court's granting of summary judgment in favor of the Respondent. (*Id.*).

On April 19, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the lower courts. (*Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), *cert. granted*, 2003 U.S. LEXIS 5033 (U.S. June 27, 2003)).

On June 27, 2003, this Court granted the Petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Respondent respectfully submits that the lower courts correctly ruled that the individual Debtor may not be a "participant" as defined by ERISA. Consequently, the individual Debtor's interest in the Plan is not protected by ERISA's anti-alienation provisions. Thus, there is no bar under ERISA to the Respondent's claim to avoid and recover the preferential transfer.

This case presents to this Court the issue of interpreting the terms "employer" and "employee" as defined by ERISA and as applied to the facts of this case. When these definitions are examined in light of the policies behind the enactment of ERISA, it is apparent that sole shareholders of corporations are characterized as employers under ERISA, and thus excluded from the protective provisions thereof.

The Respondent also submits that if the construction of ERISA espoused by the Petitioner is accepted, the policies behind the enactment of ERISA will be placed in conflict. Such conflict is avoided by the holdings of the lower courts and by classifying the Debtor in this case as the "employer" as defined by ERISA.

Finally, the Respondent submits that the decisions of the lower courts do not conflict with the decision of this Court in *Darden* and nine other circuit courts of appeals. And when the approaches of circuit courts are considered, the approach employed by the Sixth Circuit ultimately is the only approach that fosters all of the policies and goals of ERISA.

ARGUMENT

Throughout these proceedings and as their defense to this preference action, Petitioners have asserted that the individual Debtor's interest in this pension plan is excluded from the bankruptcy estate. Petitioners assert that the Debtor's interest is in an ERISA qualified plan. In their Brief before this Court, Petitioners again mischaracterize this case by asserting that the Respondent, the Bankruptcy Trustee, "in this case is attempting to alienate" the Debtor's interest in the Plan. (Petitioners' Brief at page 6). Such is incorrect. The Respondent is seeking to recover a preference from the Plan and its Trustee under the preference provisions of the Bankruptcy Code, 11 U.S.C. § 547. The individual Debtor is not named as such in these proceedings and this action is not an attempt by a creditor to alienate the Debtor's interest in the Plan. Decisions of this Court in *Patterson v. Shumate*, 504 U.S. 753 (1992) and in other cases construing whether such interests are excluded from a bankruptcy estate under Section 541 of the Bankruptcy Code simply have no

application to the case *sub judice*. However, the Respondent respectfully submits that even if the status of the Debtor's interest is considered, the lower courts correctly held that the Debtor cannot be a participant under the terms of ERISA.

A. Yates Is An "Employer" And May Not Be A "Participant" Under ERISA.

In enacting ERISA, Congress found:

> that the continued well-being and security of millions of employees and their beneficiaries are directly affected by these plans;
>
> . . . .
>
> that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans;
>
> . . . .
>
> and that it is therefore desirable in the interest of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a).

Based upon these findings, Congress declared the policy of ERISA to be to

> protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

29 U.S.C. § 1001(b).

Notwithstanding these findings, ERISA provides only a limited definition of an employer and employee. 11 U.S.C. § 1002, provides, in pertinent part as follows:

> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.
>
> (6) The term "employee" means any individual employed by an employer.

ERISA also distinguishes between a "participant" and a "beneficiary." Subsection (7) of Section 1002 provides: "The term 'participant' means any *employee*, or former *employee* of an employer, ... who is or may become eligible

to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . ." (Emphasis added). "Beneficiary" is defined in Subsection (8) as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit hereunder." Therefore, Congress limited the definition of a participant to an employee of an employer but did not so limit the definition of a beneficiary.

At issue in this case is the status of the Debtor as employee or employer, as sole shareholder of the corporation. As stated by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998), "the plain language of ERISA is ambiguous with respect to the classification of a 'dual status' employer/employee." Further, this Court has expressly stated that ERISA's definition of "employee" is "completely circular and explains nothing." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

The legislative history of ERISA provides little insight into the definitions of "employer" and "employee" but may contain some indications that are pertinent to this case. Concerning the definition of "employee" the legislative history indicates that Congress intended the definition to include persons who have the "status of an employee under a collective bargaining agreement." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4639, 4648. Under conventional labor-law principals, management would be excluded under the definition of "employee." *Kwathcher v. Massachusetts Service Emp. Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989); *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

This Court in the *Darden* case addressed the ERISA's definition of an "employee." In *Darden*, this Court was called upon to determine whether an independent contractor was an "employee" under ERISA. In that case, this Court adopted a two step approach in construing ERISA's definition of "employee." First, the Court looked to other provisions of ERISA for guidance in defining the term. *Id.* at 323. Because the Court found no assistance in other provisions in ERISA to distinguish between an independent contractor and an employee, the Court adopted a common law test. *Id.*

The Petitioner and the United States (as *amicus curiae*) both focus on ERISA's definition of "employee" and virtually ignore ERISA's definition of "employer." While the initial portions of the definition of an "employer" appear to be as circular as the definition of an "employee," additional language is included within that definition that is pertinent to this case. Within the definition of "employer," Congress included other persons acting "indirectly in the interest of an employer." 29 U.S.C. § 1002(5). This additional language expands ERISA's concept of an "employer" beyond common law or corporate law notions. *Kwathcher*, at 960.

Applying the facts of this case to the foregoing supports the lower courts' classification of the individual Debtor as "employer" and excluding him from the definition of "participant." The individual Debtor herein was the sole shareholder of the corporation. (JA 15a). The corporation at issue was not a Sub-Chapter S corporation. (JA 35a-36a). Upon the establishment of the plan, the individual Debtor was expressly designated as the Trustee of the plan. (JA 36a). Further, the "Plan Administrator" was designated as "The Employer, ATTN: RAYMOND B. YATES." (*Id.*). A loan was made to himself which was clearly prohibited in the first

place and non conforming in its terms even if initially authorized. (JA 207a and 67a-69a). The individual Debtor made investment decisions and directed the use of the plan's assets, which directions and decisions ultimately lead to losses of in excess of $248,000. (JA 315a, Affidavit of Dale Horst, a copy of which is attached hereto as an Appendix). Clearly, the individual Debtor controlled the operations of the plan and was acting directly in the capacity as an "employer, or indirectly in the interest of an employer, in relation to an employee benefit plan," within ERISA's definition of "employer." (11 U.S.C. § 1002(5)). There is simply no proof in the record as to the individual Debtor's status as employee other than an unspecified reference to "wages" (JA 9a). Under the facts of this case, the only logical conclusion is that the Debtor was acting as employer.

Contrary to the arguments made on behalf of the Petitioner and *amicus curiae*, other provisions of ERISA and the Internal Revenue Code do not provide guidance as to distinguishing between an "employer" and an "employee." For example, 29 U.S.C. § 1301(b)(1) by its plain language does not reference sole shareholders of corporations. Likewise, the Internal Revenue Code provides no assistance. By including certain shareholders within the definitions of an employee under the provisions of the Internal Revenue Code (26 U.S.C. §§ 401(c)(1), 414(q)(1)(a) and 416(1)(i)(B)(i)), Congress clearly intended to offer favorable tax treatment to such shareholders who contribute to employee benefit plans. However, by excluding such shareholders from the ERISA definitions of an "employee" and thus "participant," Congress intended to further the stated purposes of ERISA of guarding against an employer's exploitation, abuse or looting of funds collected for employee benefits plans. The differing definitions between ERISA and the Internal Revenue Code reveal that Congress may have simply intended to exclude sole shareholders from favorable protective

provision of ERISA such as the anti-alienation provisions while at the same time offering favorable tax treatment if they contributed to an employee benefit plan.

If other parts of the statutory or regulatory scheme of ERISA are to be considered, no clearer guidance as to the Debtor's status can be found than from the regulations contained in 29 C.F.R. § 2510-3.3(c)(1). That provision provides in pertinent part:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, . . .

Clearly, under this plain language, the Debtor herein, as sole shareholder, could not be considered an employee. Without regard to whether this provision is to be employed beyond the initial examination as to whether the plan itself is an ERISA qualified plan, this language is clear and provides guidance in the classification of the Debtor as employer.

Accordingly, under the facts of this case, the individual Debtor is properly classified as an "employer" instead of an "employee." The individual Debtor may thus not be a "participant" under an ERISA plan. The lower court's decision in that regard is correct and should be affirmed.

B. When The Policies Behind The Enactment Of ERISA Are Considered, The Individual Debtor Must Be Classified As An Employer.

The arguments of the parties to these proceedings illustrate potentially competing polices behind the enactment of ERISA; namely, Congress' desire to prohibit employer abuse and its desire to provide for a "single set of regulation." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). While treating a sole shareholder as an "employee" and thereby entitling the shareholder to the protections of ERISA for a "participant" may lead to uniformity of regulations relative to employee benefit plans, such treatment could inhibit the other purpose of prohibiting employer abuse.

Again as stated by the Court in *Watson*:

> ERISA Title I was adopted by Congress in 1974, in part, to remedy abuses by employers who manage pension plans assets held in trust for workers in traditional employer-employee relationships. Congress recognized that workers, i.e., traditional "employees" are vulnerable to abuse by employers because employers typically maintain exclusive control over the pension funds of their employees. In contrast, a self-employed individual such as Watson, has complete control over the amount, investment and form of the fund because he voluntarily creates and manages it for his own retirement. Congress had no reason to extend ERISA coverage to self-employed owners such as Watson. Self interests provides adequate protection. Therefore, it was reasonable for the

> Department of Labor to exclude self-employed sole shareholders from its definition of "employees" for purposes of ERISA.

Watson, at 598.

Examples of such possibilities for abuse are actually present in the case at hand. Clearly, the Debtor's actions in total disregard of the limitations contained in the plan regarding loans evidence the kinds of potential self dealing abuses discussed above. The individual Debtor's control over the funds is evidenced by his directed use of the funds resulting in losses of over $248,000. The Debtor should not be permitted to act in disregard his fiduciary obligations under ERISA and the clear limitations contained in his purported plan, treat the funds as his own for years without the requirement of making loan payments in violation of the plan, and then after the commencement of a bankruptcy case assert that he was subject to the restrictions of an ERISA qualified plan which he had previously patently ignored.

In short, actual abuse is present in the case at hand. Competing with the Congressional policy of prohibiting such abuse is the argument that by excluding shareholder owners from the definition of "participant," inconsistent state law remedies, albeit unspecified, may be available to such shareholders which would frustrate the desire for uniform regulations. On the other hand, if shareholder owners are classified as "participants", not only do benefits inure to them contrary to 29 U.S.C. § 1103(c), but they would enjoy the protective shields of the anti-alienation provision as to their interests while having complete control over the plan funds. Such employers could act in complete disregard of ERISA and plan restrictions (as the Debtor did here), and other

injured employees would have no remedies against them in instances like the present case where the employer files bankruptcy and has no other assets available for creditors. In instances like the present case, liability for breach of fiduciary obligations would be meaningless yet the only viable assets remaining for creditors would be excluded from their reach even if the assets were wrongly converted or misappropriated.

While the possibility of different regulations should be subordinate to the policy of protecting the assets of benefit plans, it is nevertheless possible to avoid these conflicts through the definition of "beneficiary." On the contrary, adopting the argument espoused on behalf of the Petitioner results in the policy of preventing abuse being subordinated to a policy of having uniform regulations.

This term "beneficiary" is plainly defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitle to a benefit thereunder." 29 U.S.C. § 1002(8). Since ERISA's civil enforcement provisions in § 502(a)(1)(B) are available for a "participant" and a "beneficiary," uniformity of regulations can achieved by including an "employer" within the broad definition of "beneficiary." However, such may be for another case as the definition of "beneficiary" is not at issue herein.

Therefore, considering the policies behind the enactment of ERISA, under the facts of this case the individual Debtor as sole shareholder should be classified as an "employer." If a bright line rule is to be established as to sole shareholders, classifying them as employers is the only result that can further all of the policies and goals of ERISA.

C. The Holding Of The Sixth Circuit In *Yates* Does Not Conflict With This Court's Opinion In *Darden*.

Petitioners also argue that the Sixth Circuit's decision in this case and in the *Fugarino* case are inconsistent with this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

In *Darden*, the sole issue was whether the claimant was an "employee" or an "independent contractor" as defined under ERISA. In making this determination, the Supreme Court noted that the term "employee" was not specifically defined in ERISA and that courts should look to traditional common law criteria of agency, such as control, in making this determination. *Id.* at 323.

As stated above, this case presents the issue as to whether the Debtor is an employer or employee under ERISA. Common law criteria of control make no sense if applied in this instance.

This employer/employee conflict and the application of *Darden* in resolving the definition, was addressed by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593 (9th Cir. 1998), a case cited by the Petitioners. In that case, the court was reviewing the bankrupt's claim to exempt his interest in his pension plan and the bankrupt's status as an employer or employee. The bankrupt was the sole shareholder of his medical corporation. In discussing the applicability of *Darden*, the court stated:

> In *Darden*, the Supreme Court addressed a different issue. Whereas here, the issue is one of

a "dual status" employer-employee, in *Darden*, the issue involved the distinction between "employees" and "independent contractors."... In deciding whether Darden could properly be considered Nationwide's "employee" for purposes of ERISA, the Court held that the term "employee" as it appears in ERISA, 29 U.S.C. § 1002(6), incorporates "traditional agency law criteria for identifying master-servant relationships.

> The traditional agency criteria can be applied logically only in situations involving relationships between two different persons, i.e., those who employ persons and those who are so employed. Accordingly, *Darden* instructs that we apply the traditional agency definition of "employee" when confronted with the question of whether a specific individual is, in relation to another, an employee or an independent contractor for purposes of ERISA. The issue we confront here is different. It is whether a self-employed owner is also his own "employee" for purposes of qualifying his Plan under ERISA. Traditional agency law criteria provide no answer. Thus, we cannot logically apply *Darden* in this case.

Id. at 597 (citations and emphasis omitted).

Likewise, *Darden*, cannot be logically applied to the Petitioners' assertion that although the individual Debtor is the sole owner of his professional corporation, he is nevertheless an employee under ERISA. As found by one court, ERISA contemplates that the "employer" and the "employee" are two separate persons and that the "twain shall never meet." *Kwatcher*, at 959. Accordingly, neither *Fugarino* nor *Yates* conflicts with this Court's decision in *Darden*.

D. The Yates Decision Is Not In Conflict With The Decisions Of "Nine Other Circuit Courts."

As a further basis in support of their argument that this Court should overrule the lower courts, Petitioners assert that the Sixth Circuit's decision conflicts with the decisions of "nine other circuit courts." However, a careful examination of these cases reveals that such is not the case.

As indicated above, the precise issue herein relates to the status of the bankrupt as employer or employee under ERISA. In construing the language of ERISA and the regulations, particularly 29 C.F.R. § 2510-3.3(c)(1)[3], the Sixth Circuit has held that sole owners or shareholders of employers may not be participants under an ERISA qualified plan. *Agrawal v. Paul Revere Life Insurance Co.*, 205 F.3d 297 (6th Cir. 2000); *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992); and *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). Many of the decisions of the other circuits cited by the Petitioners as being in direct conflict with these decisions are readily distinguished on their facts.

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3. 29 C.F.R. § 2510-3.3(c)(1) provides:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, . . .

For instance, some of the cases from the other circuits cited by the Petitioners deal with the issue of whether a particular claimant is a "beneficiary" under a group health benefit plan under ERISA. *See, e.g., Wolk v. Unum Life ins. of America*, 186 F.3d 352 (3d Cir. 1999); and *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001). In each of these cases, the courts held that the claimants were entitled to benefits under the group health plan and were thus beneficiaries of the plan as defined by ERISA. *Wolk*, at 358. ERISA's definition of beneficiary is not as issue herein.

In other instances, the courts were focusing on combined plans or groups of plans. *See, e.g., Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); and *Laventure v. Prudential Ins. Co. of America*, 237 F.3d 1042 (9th Cir. 1998). In those cases, the courts held that a plan not qualifying as an ERISA plan was not converted into a qualifying ERISA plan by either later offering it to other employees or combining it with other qualified plans. *Slamen*, at 1106; and *Laventure*, at 1047.

Other cases deal with the question of whether minority shareholders are "employers" or whether other family members of an owner are "employers." *See, e.g., Leckey, v. Stefano*, 263 F.3d 267, 272 (3d Cir. 2001), (holding that a step daughter of an owner was not an "employer"). In *Simpa v. Mass. Cass. Ins. Co.*, 256 F.3d 1006, 1011 (10th Cir. 2001) and *In re Baker*, 114 F.3d 636, 639 (7th Cir. 1997), these courts held that owners of less than one hundred percent of the stock in the employer were not excluded from ERISA's definition of participant. In fact, the court in *Baker* expressly distinguished instances where the corporation was owned by a single individual, as is case *sub judice. Id.*

Finally, in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 597 (9th Cir. 1998), the court held that the sole shareholder of the corporation/employer was not an "employee" for purposes of ERISA. Although this case is cited by the Petitioners as being in conflict with the decisions of this circuit, *Watson* actually supports the decisions of the Sixth Circuit.

Respondent does concede that some decisions of other circuits appear to conflict with the decisions of the Sixth Circuit. *See, e.g., Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1999), and *Vega v. Nat. Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999). In these cases, the courts limit the provisions of 29 C.F.R. § 2510-3.3(c)(1) to initial determinations of whether a plan meets the definition of an "employee benefit plan" but apply these definitions no further, an approach espoused by the Petitioner. However, in cases such as this case where the person holds a dual status, such an approach may produce the conflicting result of the same person being an employer in one instance yet an employee in another. The decisions of the Sixth Circuit yield no such result. According, *Yates* should not be reversed and further proceedings herein are not necessary.

CONCLUSION

In conclusion, the Respondent submits that for the reasons cited herein, the decisions of the lower courts should be affirmed. However, the Respondent wishes to add that even if the decisions are reversed and that the interest of the Debtor is deemed to be that of a "participant" in an ERISA qualified plan, the inquiry in this case does not end. While not an issue presently before this Court, the issue would then become whether the bankruptcy trustee could nevertheless avoid the transfer and recover the proceeds of the transfer from the Plan since under 29 U.S.C. § 1144(d), ERISA does not supercede other federal laws like the Bankruptcy Code. Affirmation of the decision of the lower courts would pretermit this other issue.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX — AFFIDAVIT OF DALE HORST DATED NOVEMBER 23, 1999

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION, AT KNOXVILLE

Case No. 96-34511
Chapter 7

Adversary Pro. No. 98-3088

IN RE:

RAYMOND B. YATES,

Debtor.

WILLIAM T. HENDON, TRUSTEE,

Plaintiff/Appellee,

vs.

RAYMOND B. YATES, M.D., P.C. PROFIT SHARING PLAN and RAYMOND B. YATES, TRUSTEE,

Defendants/Appellants.

AFFIDAVIT OF DALE HORST

I, Dale Horst, hereby swear and affirm the following:

1. I am the President of ERISA Services, Inc.

2. ERISA Services, Inc. has been engaged by the Raymond B. Yates, M.D., P.C. Profit Sharing Plan ("Plan") to be the third party administrator of such Plan.

3. As part of our contractual arrangement, ERISA Services, Inc. provides accounting and compliance administration for the Raymond B. Yates, M.D., P.C. Profit Sharing Plan.

4. As of June 30, 1996, the total amount of assets in the Plan were $373,376.44.

5. Dr. Yates total account balance as of June 30, 1996 was $366,852.55.

6. Loraine Yates, Dr. Yates daughter's, account balance as of June 30, 1996 was $3,009.33.

7. Marshall West, an employee of Raymond B. Yates, M.D., P.C. who is not related to Dr. Yates', account balance as of June 30, 1996, was $411.74.

8. Marilyn Bacon, an employee of Raymond B. Yates, M.D., P.C. who is not related to Dr. Yates', account balance as of June 30, 1996 was $3,102,82.

9. On June 30, 1997, ERISA Services, Inc., based on the Plan's accounting procedures, wrote off $248,041.56 which included the original investment plus accrued interest from Dr. Yates' individual account because of an investment in Spectrum Consulting, Public Storage Properties & Professional Management, Inc. Dr. Yates directed that $210,000 be invested in Spectrum Consulting. Spectrum Consulting dissolved and is no longer a viable corporation. Public Storage's loss was $19,062. Professional Management, Inc.'s loss was $25,000. Dr. Yates' Plan lost its total investment in these businesses.

10. As of June 30, 1998, the total amount of Dr. Yates' individual account balance is $127,553.27.

FURTHER AFFIANT SAITH NOT.

s/ Dale Horst
Dale Horst, President
ERISA Services, Inc.